

Summary of Oregon CZARA Settlement Agreement and Implementation-Ready TMDLs (2/28/12 draft)

Background

On January 6, 2009, the Northwest Environmental Advocates (NWEA) sued EPA in the lawsuit, ***Northwest Environmental Advocates v. Locke, et al., Civil No. 09-0017-PK***, for violations of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). CZARA requires certain states to develop and implement coastal nonpoint source pollution control programs and requires EPA and NOAA to withhold a percentage of Clean Water Act (CWA) and Coastal Zone Management Act (CZMA) grant funds from states that fail to submit approvable programs that protect water quality.

On September 29, 2010, EPA, NOAA and NWEA signed a settlement agreement on the Oregon CZARA lawsuit. The settlement agreement has three areas which must be satisfied: 1) Addressing onsite disposal systems (OSDS); 2) New development management area requirements; and 3) Additional Management Measures for Forestry. The overlap with implementation-ready TMDLs falls under this 3rd area to address issues in forestry.

CZARA Additional Management Measures for Forestry Options

There are two options to satisfy the third area of the settlement agreement, “Additional Management Measures for Forestry.” Option 1 is the prescriptive, implementation-ready TMDL titled “TMDL Process for Increased Riparian Protection”. Option 2 to address “Additional Management Measures for Forestry” are rule changes by the Oregon Department of Forestry. So far, Oregon Department of Environmental Quality (ODEQ) has chosen Option 1, the implementation-ready TMDL route, to address the third area of the CZARA settlement agreement. The Mid-Coast TMDL will be the first implementation-ready TMDL in Oregon to satisfy the third measure of the CZARA settlement agreement requirements and must be submitted to EPA by June 30, 2012. The six other basins in Oregon subject to the CZARA lawsuit are the Coos, Rogue, Umpqua, Sixes and Chetco, Coquille, and North Coast TMDLs. They are scheduled to have implementation-ready TMDLs by the year 2021.

Requirements of a Prescriptive, Implementation-Ready TMDL

On May 12, 2010, NOAA and EPA sent a letter to ODEQ describing what a prescriptive TMDL process should look like. These include the following:

- Clarifying the mechanism ODEQ will use to require prescriptive, “safe harbor” BMPs.
- Describing the prescriptive TMDL approach to address landslide prone areas and road density and maintenance, particularly on legacy roads.¹
- Provide examples of “safe harbor” BMPs that ODEQ will use to provide adequate protection of riparian and landslide areas.
- Provide a schedule for developing implementation-ready TMDLs.
- Complete and submit prescriptive, implementation-ready TMDLs for the mid-Coast by June 30, 2012.

Oregon’s commitments thus far on Implementation-Ready TMDLs

Oregon has committed to a new approach to ensure that forest practices attain and maintain water quality standards. On July 2, 2010, the Oregon Attorney General sent a legal opinion to EPA and NOAA that describes the legal basis to make TMDLs enforceable against nonpoint sources. The legal opinion addresses whether

ODEQ has legal authority over logging given the state Forest Practices Act which puts the Oregon Department of Forestry in charge of logging practices. The legal opinion states that ODEQ is authorized to establish its own requirements to the extent required by the federal Clean Water Act and to the extent DEQ deems the ODF practices inadequate to implement the TMDL. It goes on to say that ODEQ “may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required” and further that ODEQ “has the authority to directly order compliance with the load allocation because such measures are required by the [Clean Water Act].”

What else has Oregon agreed to do?

Oregon has agreed to:

- (1) *Identify specific nonpoint sources*, including logging, in each TMDL;
- (2) *Identify the logging practices necessary* to meet the TMDL load allocations;
- (3) Issue the load allocations as *enforceable orders* to significant land owners and agencies;
- (4) Provide a schedule (March 2011) for developing coastal TMDLs with the new approach;
- (5) Develop the Mid-Coast TMDLs by June 30, 2012 using the new approach in order to demonstrate that ODEQ can and will use TMDLs to control water pollution from logging.

EPA/NOAA's Commitments Under the Settlement Agreement on Implementation-Ready TMDLs

EPA and NOAA agreed to provide Oregon (and a copy to the plaintiff) with a written initial assessment that will evaluate (a) whether implementation of the Oregon Coastal TMDL Approach in the Mid-Coast Sub-basins, including the safe harbor BMPs, is likely to result in actions that achieve and maintain water quality standards, and (b) whether Oregon's plan for developing and updating TMDLs for all sub-basins in the CNPCP management area using the Oregon Coastal TMDL Approach could satisfy the outstanding forestry condition on Oregon's CNPCP under 16 U.S.C. § 1455b(b)(3) by December 31, 2012,. In addition to the TMDLs, this assessment and its due date is based upon Oregon's July 2, 2010, Attorney General's Opinion, the July 26, 2010, ODEQ commitment letter, the schedule for implementing the Oregon Coastal TMDL approach that EPA and NOAA requested the state submit by March 31, 2011, the Mid-Coast Basin TMDLs implementing the Oregon Coastal TMDL Approach that EPA and NOAA requested the state to submit by June 30, 2012, and any other information), In developing their initial assessment, EPA and NOAA shall consider any comments Plaintiff may have submitted with respect to ODEQ's proposed TMDLs and BMPs.

Progress on the Mid-Coast TMDL

ODEQ is planning to complete TMDLs for temperature, sediment, and bacteria in the Mid-Coast Basin by June 30, 2013 and are scheduled to have a draft TMDL out for public comment by January 31, 2013. Their facilitated public process² begins on March 20, 2012 with three committees: a technical advisory committee (TAC), a local stakeholder advisory committee (LSAC), and a policy workgroup.

ODEQ has made good progress on the temperature TMDL because of clear numeric water quality standards and experience with temperature TMDLs. The sediment TMDL poses the most questions because there is a general, narrative water quality standard. Therefore, ODEQ had to develop a basis to define impairment and the numeric TMDL target to which the TMDL must meet. ODEQ has defined impairment through a combination of biological targets and in-stream sediment targets. The LiDAR studies have been crucial in identifying landslide-prone areas. GRAIP studies have been used to identify and prioritize roads. (Helen, more detail on approach?)

Though not required by the CZARA settlement agreement, ODEQ is also doing a bacteria TMDL for the Mid-Coast Basin. For the Big Elk Watershed in the Mid-Coast Basin, ODEQ will be completing an implementation-ready TMDL

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for bacteria using HSPF and a more detailed public involvement process, modeled after bacteria TMDLs in Virginia.

¹ EPA HQ's support through TMDL-dedicated funds and the reasonable assurances pilot project of LiDAR is a crucial part of the technical basis to identify and support improvements in landslide-prone areas. Region 10 and ODEQ appreciate the support.

² EPA HQ's support through TMDL-dedicated funds for the facilitation plays an important role in the success of the public involvement and development of the BMPs. Oregon's budget is limited, and the financial support greatly increases ODEQ's chance of success to meet the CZARA settlement agreement requirements and achieve improvements in nonpoint sources.